

<b>STATE OF SOUTH CAROLINA</b>	)	<b>BEFORE THE CHIEF PROCUREMENT OFFICER</b>
<b>COUNTY OF RICHLAND</b>	)	
	)	<b>DECISION</b>
In the Matter of Protest of:	)	
	)	<b>CASE NO.: 2008- 147</b>
Fitness Resource	)	
	)	
University of South Carolina	)	<b>POSTING DATE:</b>
IFB No. USC IFB-1339-DH	)	
Furnish, Deliver & Install Fitness	)	<b>DECEMBER 1, 2008</b>
<u>Equipment @ USC Upstate</u>	)	

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Fitness Resources. With this invitation for bids (IFB), the University of South Carolina (USC) attempts to procure fitness equipment for a new wellness center at its USC Upstate campus. In the letter, Fitness Resources protested USC's intent to award to Wilkins Fitness LLC, dba Charleston Fitness Equipment (Wilkins), alleging in total, "I would like to formally protest the Award of Lot A of solicitation number USC-IFB-1339-DH and the Intent to Award of Lot C of the same solicitation under the grounds that the equipment offered by Wilkins Fitness LLC does not meet the specifications of the bid request for either lot."

In order to resolve the matter, the CPO conducted a hearing November 17, 2008. Appearing before the CPO were Fitness Resource, represented by Jason Puckett, Commercial Sales; Wilkins, represented by Michele and Dan Wilkins; and USC, represented by George Lampl, Esq.

### **NATURE OF PROTEST**

With the exception of "I would like the opportunity to prove the above accusation", the entire protest is quoted above.

### **FINDINGS OF FACT**

The following dates are relevant to the protest:

1. On September 11, 2008, USC issued the IFB. [Ex. 1] The IFB asked prospective bidders to offer on three lots, Lot A – Lot C. Each lot contained numerous items, as follows: Lot A - 23 line items of strength equipment machines, plus a 24<sup>th</sup> line item for shipping, inside delivery, installation and performance check; Lot B - 17 lines items of free weight equipment, plus an 18<sup>th</sup> items for shipping, inside delivery, installation and performance check; and Lot C – 7 line items of cardiovascular equipment, plus an 8<sup>th</sup> line

item for shipping, inside delivery, installation and performance check. The IFB specified that awards would be determined by lot based upon the lowest total cost for each lot.

2. On September 18, 2008, USC closed the question and answer period. No amendment was issued to the IFB.
3. On October 3, 2008, USC opened the following bids relevant to this matter as follows:

<u>Bidder</u>	<u>Bid Amount</u>
<b>Lot A</b>	
• Wilkins Fitness	\$63,860.00
• Fitness Resource	69,675.00
• Sportime	70,088.04
• Fitness LifeStyle	72,923.51
• Innovative Fitness	82,656.77
• Cybex	89,102.75
• USA Fitness	91,364.20
<b>Lot C</b>	
• Fitness LifeStyle	\$104,646.10 <sup>1</sup>
• Wilkins Fitness	106,638.40
• Inovative Fitness	118,472.90
• Fitness Resource	125,460.00
• USA Fitness	174,142.56

4. On October 17, 2008, USC posted notices to award Lot A to Wilkins, Lot B to Sportime, and Lot C to Wilkins.
5. On October 20, 2008, the CPO received a protest from Fitness Resource for Lots A and C.

### **MOTION TO DISMISS**

At the outset of the hearing, USC made a motion to dismiss Fitness Resource's protest as too vague to provide the parties with notice of the issues to be decided. USC argued that the protest letter does not rise to the standard required by the statute that reads "A protest, including amendments, must set forth both the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided." [11-35-4210(2)(b)] USC argues that Fitness Resource did not state any grounds; that it was not

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<sup>1</sup> USC rejected Fitness LifeStyle's bid because the equipment specified required a removable chair for items 3 and 4, exercise bikes, to allow handicapped access. Fitness LifeStyles bid exercise bikes for items 3 and 4 that did not offer removable seats.

specific enough to give notice of the issues to be decided, or request relief. The ruling on the motion was held in abeyance and the hearing proceeded. A decision on the motion is rendered herein.

### **DETERMINATION**

The CPO finds that Fitness Resource did not meet the standard required of a protestant by SC Code section 11-35-4210. In its protest, Mr. Puckett of Fitness Resource wrote, "I would like to formally protest the Award of Lot A of solicitation number USC-IFB-1339-DH and the Intent to Award of Lot C of the same solicitation under the grounds that the equipment offered by Wilkins fitness LLC does not meet the specifications of the bid request for either lot." However, Fitness Resource did not provide any particularity regarding how or for which items Wilkins did not meet the specifications. Lot A listed 23 items of strength equipment plus another item for shipping, inside delivery, installation and performance check. Lot C listed 7 items of cardiovascular equipment plus another item for shipping, inside delivery, installation and performance check. Fitness Resource did not state in its protest any specifics whatsoever regarding which of the 30 items offered by Wilkins for Lots A and C did not meet USC's specifications. Therefore, Fitness Resource did not provide Wilkins or USC adequate notice of the issues to be decided; a minimum standard required by the Code.

The Procurement Review Panel has ruled on the issue of a protest being too vague to meet the legal standard established in the Code. For example, the Panel wrote:

BCBS's protest letter as well as its letter in response to a request to clarify this issue, state a broad allegation that Pearce's bid is not in compliance with age rating guidelines of the Equal Employment Opportunity Commission and other laws cited in part III A2C of the IFB. This part of the IFB cites five federal Acts.

The Panel, in Case No. 1987-3, In re: Protest by J&T Technology, held that protestants must "state their grievance with enough specificity to put all parties on notice of the issues to be decided." Further, in Case No. 1993-16, In re: Protest of NBS Imaging Systems, Inc., the Panel states that the larger the solicitation, "the more specific a protestant will need to be to state its grievance and give notice of the issues of protest." BCBS does not specify how Pearce's bid is not in compliance, nor does it specify what parts of the law to which Pearce's bid is not in compliance. The Panel grants Pearce's motion to dismiss as vague the issue of Pearce's bid violating age rating guidelines in federal law. (Case No. 1996-9, Protest of Blue Cross Blue Shield of South Carolina.)

In a similar case, the Panel wrote the following:

Horizon and DPC allege that NCS' proposal does not meet the requirement of RFP paragraph 3.3, General Module Requirements. However, the issue as stated is insufficient to give notice of the issue to be determined. The paragraph referenced is separated into fourteen sections, over three pages, containing several requirements. The stated issue does not allege a specific requirement and how the specific requirement fails to be met. The statement is too vague to state an issue. (Case No. 1998-6, Protest of DP Consultants, Inc.)

Consequently, the Motion of USC to dismiss the protest is granted.

Alternatively, should the Panel disagree with the CPO in this determination; I will address the merits of the protest offered by Fitness Resource. Fitness Resource argued that certain of Wilkins' offerings did not equal the equipment specified in a variety of ways.

For example, at the hearing, Fitness Resource alleged that Wilkins' bid for Lot A, Item 1, did not offer gas assist function or a weight shroud and that Wilkins' equipment is bolted together, not welded, unlike the Cybex equipment that USC specified. Fitness Resource alleged further that Fitness Resource could not verify that Wilkins' equipment was ASTM certified because Wilkins did not provide evidence of any such certification with its bid.

At the hearing, Fitness Resource alleged that Wilkins' bid for Lot C, Item 1, Treadmill, and Lot C, Item 2, Elliptical, did not offer:

- Embedded 15 inch LCD screen, but offered a detached television screen instead.
- ipod compatibility
- USB port
- Virtual trainer
- Landscapes
- Zoom
- Language choices

- FM radio availability
- Promo channel

For the Treadmill, Fitness Resource alleged additionally that Wilkins' equipment did not offer Stride sensor (auto-stop) or thumb access ergo bar operation. For the elliptical, Fitness Resource alleged additionally that Wilkins' equipment did not offer resistance control on the elliptical arms.

For the exercise bike, Lot C, Items 3 and 4, Fitness Resource alleged that Wilkins' equipment did not offer wide pedals.

USC specified one manufacturer and model number for each lot of fitness equipment: Lot A – Cybex, Lot B – Cybex, and Lot C – Life Fitness and allowed bidders to offer the specified equipment or other manufacturers' products that were "equal in quality and performance." [Ex. 1, p. 12, Terms and Conditions – B. Special] Unfortunately, USC did not provide any salient features of the specified fitness equipment to distinguish its form, function or performance from the models set forth to that of any other fitness equipment. While the use of "name brand or equal" specifications are common, the Panel has admonished agencies when using name brand or equal specifications to list different brands or salient features to that might be useful in distinguishing the specified equipment from any other products offered as equal.

For example, the Panel has consistently offered the following advice regarding the use and application of "Brand-Name or Equal" specifications wrote:

Specifications are clear and accurate detailed descriptions of the technical requirements for the purchase of supplies, equipment or services. Specifications define the minimum requirements for the quality and construction of a desired product. The specification before the Panel is a "Brand-Name or Equal" Specification. The technical requirements found in the specification were directly transposed from the manufacturer's product literature. The evidence before the Panel demonstrates that the product description was utilized in a restrictive manner. The bid of the Protestant appears, from the evidence on the record, to have been rejected due to minor differences in design, construction, and features, which do not affect the suitability of the product for its intended use. "Brand-Name or Equal" Specifications should set out all known acceptable brand name products. The specification before the Panel did not list any other brand names. Where a purchase description is used, bidders must be given the opportunity to offer products other than those specifically referenced if those other products will meet the needs of the State in essentially the same manner as

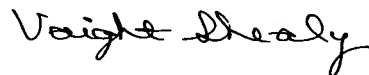
those referenced. It should always be clear that a "Brand-Name or Equal" description is intended to be descriptive not restrictive and is merely to indicate the quality and characteristics of the product that will be satisfactory and acceptable. Products offered as equals must, of course, meet fully the salient characteristics and product requirements listed in the invitation for Bids. Case No. 1983-5, In Re: Protest of General sales Company Order, Inc.

USC did not comply with that admonishment. Consequently, the analysis of "equal" must be based on the obvious deviations from the specified equipment rather than the fine distinctions that separate products. Of further consideration is whether these deviations might have offered one bidder more than a minor price advantage over other bidders.

Such analysis is complicated by the manufacturing preferences of the various manufacturers' products bid. For example, all manufacturers provide certain control mechanisms or manufacturing differences to distinguish their products from others. Some of these distinctions affect performance; others do not.

In this case, the CPO finds some distinctions between the specified equipment and Wilkins' offerings. However, the CPO finds the argument that Wilkins' bid is inferior to the specifications inconclusive. USC testified that the equipment offered by Wilkins is suitable and meets its specifications as an "equal" of the model specified. To grant the protest would, in effect, reject Wilkins' bid due to minor differences in design, construction, and features, which do not affect the suitability of the product for its intended use. The CPO finds that Fitness Resource has not carried its burden of proof by the preponderance of evidence for the CPO to conclude otherwise. Following the Panel's admonishment,

Therefore, the protest is also denied on this additional ground.



R. Voight Shealy  
Chief Procurement Officer  
for Supplies and Services

December 1, 2008

Date

Columbia, S.C.

## STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

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Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: [www.procurementlaw.sc.gov](http://www.procurementlaw.sc.gov)

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2008 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2008 S.C. Act No. 310, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

**Martin, Deb**

**From:** Protest-MMO  
**Sent:** Monday, October 20, 2008 3:08 PM  
**To:** \_MMO - Procurement; Shealy, Voight  
**Subject:** FW: USC-IFB-1339-DH  
**Importance:** High

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**From:** Jason Puckett[SMTP:JPUCKETT@FITNESSRESOURCE.COM]  
**Sent:** Monday, October 20, 2008 3:10:59 PM  
**To:** Protest-MMO  
**Subject:** USC-IFB-1339-DH  
**Importance:** High  
**Auto forwarded by a Rule**

To Whom It May Concern:

I would like to formally protest the Award of Lot A of solicitation number USC-IFB-1339-DH and the Intent to Award of Lot C of the same solicitation under the grounds that the equipment offered by Wilkins Fitness LLC does not meet the specifications of the bid request for either lot.

I would like the opportunity to prove the above accusation.

Jason Puckett  
Fitness Resource  
Commercial Sales  
803-996-6301 (Office)  
803-996-6302 (Fax)

10/29/2008